Freedom N.Y., Inc.

April 27, 2001

Mr. Edward S. Adamkewicz
Recorder
Armed Services Board of Contract Appeals
Skyline Six
5109 Leesburg Pike
Falls Church, VA 22041-3208

RE: APPELLANT'S MOTION TO STRIKE THE GOVERNMENT'S AFFIRMATIVE DEFENSES AND TO ACCEPT THE SUPPLEMENTAL BRIEF SUBMITTED WITH THIS MOTION

ASBCA No. 43965
Appeal of Freedom NY, Inc.
Under Contract No. DLA13H-85-C-0591

Mr. Adamkewicz:

The above referenced Motion is filed in accordance with ASBCA Rule 5,

Sincerely,
Freedom N.Y., Inc.

Henry Thomas
President

cc: Counsel
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Philadelphia, PA 19111
Att'n: Kathleem D. Hallem, Esq. (DSCP-G)

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BEFORE THE ARMED SERVICES
BOARD OF CONTRACT APPEALS
Falls Church, Virginia 22332

APPEAL OF:	)	
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FREEDOM N.Y., INC.	)	
CONTRACT NO. DLA13H-85-C-0591	)	

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ProSe
Henry Thomas.
President
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JURISDICTION

This motion is submitted under ASBCA Rule No. 5, entitled "Motions," and under the plenary power of the Board to provide relief from an interlocutory order as justice requires. See FRCP 60, note 36 entitled "Interlocutory Orders."

INTRODUCTION

On June 1, 2000, the Board ruled on the submission of post-hearing briefs. Tr. pp. 2151-2152(lms 1&2). The ruling, as explained in detail below, was compusory. It required, without discretion, the submission by the parties of post-hearing briefs. It allowed the parties the discretion to submit reply briefs.

Appellant submitted its post hearing brief, in accordance with the order of the Board, on January 2, 2001. During a conference call on March 8, 2001, the Government informed the Board that it might not submit a post-hearing brief. Inasmuch as the Government had already missed the filing date for its post-hearing brief, the Government requested a 30 day extension. Appellant did

not object and the Board granted the extension. The Government was given until April 2, 2001 to submit its brief.

Appellant sought to clarify its right to submit a reply brief in the event the Government failed to submit. The Board stated that the Appellant would not have that right. Appellant formally objected to that ruling.

By letter of March 13, 2001, at the Board's request, Appellant reduced the March 8th conference call discussion to writing and submitted it to the Board with a copy to the Government. By letter of March 28, 2001, the Government informed the Board, copy to Appellant, that it would not submit a brief.

MOTION TO STRIKE THE GOVERNMENT'S AFFIRMATIVE DEFENSES AS ABANDONED

Appellant Moves the Board to Strike the Government's Affirmative Defenses as Abandoned

On July 15, 1998, the Government filed its "Answer to Appellant's More Definite Statement, Affirmative Defenses < (sic) and Counterclaim." The Government, by its settlement of Appellant's termination for convenience settlement proposal, has admitted that Appellant does not, in fact, owe the Government the $1.6 million alleged. App. Br., Exh. 1. Accordingly the Government's counterclaim is of no effect. The Government's affirmative defenses, however, remain.

By its affirmative defenses, the Government has asserted that Appellant's claims are barred by statute of limitations (Ans. ¶72), accord and satisfaction (Ans, ¶73), waiver (Ans. ¶74), and/or release (Ans. ¶75). The Government clearly has the burden of proof with respect to each

defense.

The Board was quite clear in its briefing order of June 1, 2001. With respect to initial, i.e., principal, post-hearing briefs, the Board used compulsory language. With respect to reply briefs, the Board used permissive language.

The Board, on June 1st, instructed the parties on both principal post-hearing briefs and reply briefs. The Board was clear that the submission of principal post-hearing briefs was not discretionary. First, the Board unequivocally directed the parties to submit post-hearing briefs. The Board said that a letter would be forthcoming as of receipt of transcripts telling the parties that they **"are,"** (not "may,") "to submit post-hearing briefs as decided at the conclusion of the hearing." Tr. p. 2151, lns. 8 and 9. The Board then instructed the Appellant in no uncertain terms that "(t)hat will give you the end date by which **you are** to submit your post-hearing brief." Id., lns 12 and13, emphasis added. The Board told the Government that once it received the Appellant's brief "the Government will have 60 calendar days. . . .to submit the Government's brief. Id., lns. 16-18.

The Board was equally clear that the parties had the discretion whether or not to submit a reply brief. The Board said. "If either party wishes then you **may** submit reply briefs." Id., ln. 20. And again, with respect to the Government's reply brief, the Board said "and then the Government's reply brief **if any** would be due 30 days after she has received Appellant's reply brief." Id., lns. 22-24, emphasis added.

The Board could have couched submission of the post-hearing brief in permissive terms as it did the reply brief. Instead, the Board's terms were compulsory with respect to the principal post-hearing brief.

By failing to submit a required post-hearing brief, the Government has left the Board with no cogent argument, tied to the record of the case, as to why it should prevail on any of its affirmative defenses. The government's burden of proof, as a starter, must of necessity include the burden of identification of that proof. Instead, the Government has placed on the Board an impossible burden of searching the voluminous record to find the support that the Government had the burden to provide.

Appellant doubts that it would be allowed to prevail if it had acted, as has the Government, with respect to its own burden. Appellant asserts that by failing to submit its brief the Government has in effect abandoned its burden of proving the defenses and, in fact, the defenses themselves. Accordingly, Appellant hereby moves that the Board strike each and every one of the Government's affirmative defenses.

MOTION TO ACCEPT THE ATTACHED SUPPLEMENTAL BRIEF

In the Alternative. Appellant Moves the Board to Accept the Attached Supplemental Brief on the Basis that the Government's Failure to Submit a Brief is Itself a Government Response to Appellant's Position to which Appellant should have a *right to* Reply.

Because of the Government's unexpected refusal to address its actions in this matter in writing, i.e., its refusal to submit a post hearing brief, Appellant was not able to give the Board its full argument and position on major Government defenses. These defense, as set forth above, include the release language of Modifications P00025 and P00029 and accord and satisfaction.

Appellant maintains that a fair reading of the language of the Board's briefing order of June 1, 2001 lead Appellant to believe that the Government was required to submit a principal post-hearing brief. For this reason, and because the Government had the burden of proving its affirmative defenses, Appellant chose to await that proof before fully presenting its position on those defenses. The Government's silence on those defenses, the June 1st order notwithstanding, is a Government response, i.e., the government is in effect responding that the record is so clear that no written explanation is necessary. Appellant maintians hereby, that in fairness and equity, it should be allowed to reply to the Government's response.

Based on the foregoing, and in response to the Government's position, Appellant hereby moves the Board to accept the attached supplemental brief that addresses the waiver, release and accord and satisfaction affirmative defenses.

Appellant Moves the Board to Accept the Attached Supplemental Brief on the Basis that Denying Appellant the Right to Address the Government's Affirmative Defenses would be Unjust and Inequitable.

Appellant argues in its Supplemental Brief that the affirmative defenses of release, waiver and accord and satisfaction all should fail because:

- **Neither of the releases in Modification 25 and 29 were supported by consideration.** No benefit of any kind was provided by the Government in return for the releases.
- **The Government failed to perform its own obligations under Modifications 25 and 29.** As examples: it did not provide GFM a required; it did not pay for

MRE units delivered and accepted; it did not in good faith, process a Guaranteed Loan on Freedom's behalf.

- **Enforcement of the releases would be so unfair to Freedom as to render them unconscionable.**
- **The execution of Modification 25 by Freedom was induced by fraud.** Freedom signed the modification (with its release) based solely on the Government's misrepresentation that it would process a Guaranteed Loan on Freedom's behalf, and it did not do so.
- **Freedom's claims for equitable adjustment and breach of contract were specifically excluded from the release in Modification 29.** Freedom's entitlement under the "Changes" clause resulted in "monies due or to become due as payment for product delivered".
- **The release in Modification 29 was ineffective as a defense to Freedom's claims because Freedom's claims had not arisen at the time Modification 29 was signed.** The claims were, in fact, post Modification 29 events.
- **Modification 29 and the release provision therein are unenforceable because the modification was signed under duress.** Freedom did not voluntarily accept the terms of Modification 29. Nor did Freedom have any practical alternative to signing the Modification.

In addition, Appellant's Supplemental Brief also addresses the fact that millions of dollars in damages occurred subsequent to the execution of Modification 29.

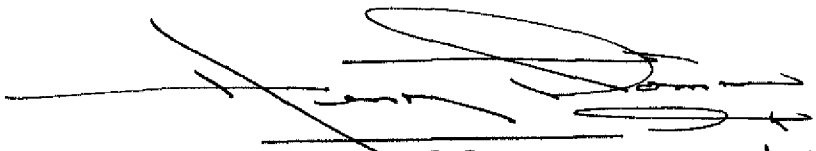
As set forth above, Appellant had a reasonable belief that the Government was required, pursuant to the wording of the Board's June 1st order, to submit a principal post-hearing brief. This belief was held, and communicated to Appellant, by its attorneys. Further, Appellant has the burden of proof with respect to its affirmative case, the Government has the burden of proof with respect to its affirmative defenses.

The Government should not be allowed to escape the Board's consideration of Appellant's position on affirmative defenses by gaming the procedure, i.e., refusing to file the expected brief. Appellant should not be prejudiced by its attorneys belief, even though it may have been incorrect, that the Government was required to file.

Appellant has prepared a substantial, substantive Supplemental Brief addressing the defenses outlined above. Appellant considers that any decision on its appeal without Board consideration of Appellant's position would be inequitable, unjust and unfair. It would be a decision driven more by procedure than by substance.

Based on the foregoing, and in reliance on the Board's plenary power to administer, i.e., modify, abrogate, etc., the Board's own interlocutory orders as justice requires, *Johnson v. Bensalem,* 609 F.Supp. 1340(1985);*Waco-Portere Corp. V. Tubular Structures Corp. Of America*, 222 F.Supp. 332(1963); *Kliaguine v. Jerome,* 91 F. Supp. 809, Appellant hereby moves the Board to accept and include in the record Appellant's supplemental brief, attached hereto, in response to the Government affirmative defenses.

Respectfully submitted. ProSe

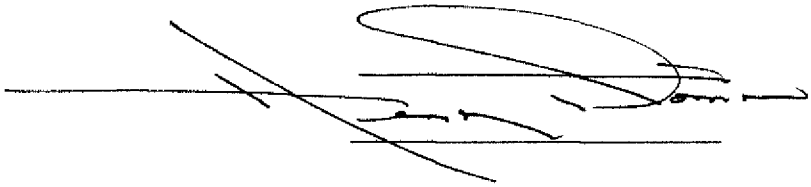


Freedom N.Y., Inc.
Henry Thomas, President

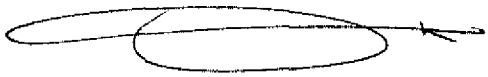
27 April 2001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of April, 2001 a copy of the foregoing Appellant's Motion to Strike the Government's Affirmative Defenses and to Accept the Supplemental Brief Submitted with this Motion was sent by overnight delivery, postage pre-paid, to Kathleen D. Hallam, Esquire, Chief Trial Attorney, Defense Supply Center, Philadelphia, (DSCP-G), 700 Robbins Avenue, Philadelphia, Pennsylvania 19111, attorney for the Government.



Henry Thomas, President



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APPELLANT'S SUPPLEMENTAL POST-HEARING BRIEF

This supplement to Appellant's Post-Hearing Brief is submitted pursuant to Appellant's motion for Board acceptance of its supplemental brief and the Board's order granting same. It is submitted to assure that the Board's decision in this matter has the full benefit of Appellant's position as to the validity of release language included in Modifications POOO25 and POOO29 of the referenced contract. By refusing to submit its own brief in this matter, the Government has sought to deprive the Board from the benefit of a full briefing on the releases in question. This supplemental brief has been allowed based on the recognition that a decision without Appellant's position on these issues critical to entitlement would be unfair and inequitable in that such decision could be considered heavily biased by procedure rather than substance.

I INTRODUCTION

During the course of Contract DLA13H-85-C-0591 (the "Contract"), Appellant executed bilateral modifications that included general release language. If this language is enforced, the Appellant will recover significantly less compensation even if the Board was to find that Appellant's damages were caused by otherwise compensable acts or omissions of the Government. The releases set forth in Modifications POOO25 and POOO29 are not valid and thus, do not bar Appellant's claims, for the reasons set forth below.[1]

[1]The following arguments rely, in part, on the presentation of extrinsic evidence to show

II. MODIFICATION POOO25

A. The Modification POOO25 (Modification 25) Release Fails for Lack of Consideration

1. The Law of Releases.

the real intent and meaning of the language of the releases. The law is clear that such "parole evidence" is allowed in the consideration of the validity of a release. In that regard, the courts boards and authorities have made the following observations:

> The intent of the parties at the time the modification was signed is important and controls as to the scope and finality of a release. It is appropriate to look at surrounding circumstances in determining the true intent of the parties. *Moore Overseas Construction Co.*, ENG BCA No. PCC-125, 98-1 BCA ¶29,682 (1998).

> Releases are to be scrutinized carefully to determine the true intent of the parties. *Green Builders, Inc.*, ASBCA No. 35518, 88-2 BCA ¶20,734 (1988); *R.C. Hedreen Co.*, ASBCA No. 20599, 77-1 BCA ¶12,328 (1977).

> The scope of a release is determined by the intention of the parties as expressed in terms of the particular instrument, considered in the light of all the facts and circumstances. In interpreting a release to determine whether a particular claim has been discharged, the primary rule of construction is that the intention of the parties shall govern and this intention is to be determined with a consideration of what was within the contemplation of the parties when the release was executed which in turn is to be resolved in the light of all of the surrounding facts and circumstances under which the parties acted.. 66 AM. Jur. 2d, Release §30 and cased cited therein (fns. 85, 87 and 88).

> There are exceptions to the parole evidence rule where, for example, a written agreement is based on mutual mistake or is procured by one of the parties through fraud or material misrepresentation on which the other party relies. Anyone of these exceptions would permit the contractor to vary the terms of the written release. Expressed in contract law terms, such a release would them be voidable pro tanto, i.e., to the extent that they would bar a claim. *C&H Commercial Contractors, Inc. v. United States,* 35 Fed. Cl. 246 (1996).

a. Consideration is required.

To be valid, a release must be supported by consideration. In *Paccon, Inc. v. United States*, 185 Ct. Cl. 24; 399 F2d 162 (1968), the Government relied on release language as follows:

> The contractor hereby waives any known or reasonably apparent claim against the Government for damages or extension of time by reason of delay heretofore occasioned by the Government in the performance of this contract.

The Court found that the language had been inserted into modifications that contained compensation, and therefore consideration, only for the work required thereby. Citing *A.R.S. Inc. & National Truck Rental Co., Inc. v. United States,* 157 Ct. Cl. 71 (1962) for the proposition that a valid release must be supported by consideration, the court said:

> (S)ince the price adjustments contained in these modifications covered only the cost of the actual changes, as demonstrated by the computations accompanying them, there is no consideration to support the waiver clauses inserted gratuitously.

b. It is not consideration if it is performance already due.

If a contractor is otherwise entitled to delay extensions and the additional costs thereof, agreement by the contractor to such delay and/or cost is not consideration for a release and/or accord and satisfaction that would be a bar to further monetary claims.

In *Bootz Manufacturing Company, Inc.,* ASBCA No. 18787, 76-1 BCA ¶ 11,799 (1976), the contractor claimed costs on account of Government caused delays. The Government pointed to a modification that had extended delivery dates to accommodate those delays. The modification contained release/accord and satisfaction language as follows:

> Amendment in delivery is an equitable adjustment for all excusable delay under this contract and is made at no change at contract price.

The Board rejected the language as either a release of the monetary claims on account of the delay or as an accord and satisfaction. The Board cited the definition of accord and satisfaction, established by Court of Claims, in *Emerson-Sack-Warner Company v. United States,* 416 F.2d 1335, 1343, 189 Ct. Cl. 264 (1969), as follows:

> Discharge of a claim by accord and satisfaction means a discharge by the rendering of some performance different from that which was claimed as due and the acceptance of such substitute performance by the claimant as full satisfaction of his claim. 6 Corbin, Contracts §1276(1962). An accord and satisfaction has been aptly described in the following manner:
>
> > The essential elements of an effective accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration. And its most common pattern is a mutual agreement between the parties in which one pays or performs and the other accepts payment of performance in satisfaction of a claim or demand which is a bona fide dispute.

Bootz Manufacturing Co., supra.

c. Failure of performance renders consideration invalid.

The Postal Service Board addressed the failure of performance in *Absher Construction Company,* PSBCA No. 951, 82-1 BCA ¶15,657 (1982). In that case the contractor signed a general release believing that all outstanding matters were resolved and that it would receive full final payment. Subsequent to the execution of the releases the Government assessed liquidated damages against the contractor. The Board found that the consideration for the release was the full payment expected so that the failure to make full payment, i.e., the imposition of liquidated

damages, amounted to a failure of consideration. In so finding, the Board provided the following summary of the law:

> The courts, even in upholding the validity of releases, frequently have stated that a valid release must be supported by consideration, see for example, *Inland Empire Builders, Inc. v. United States,* 424 F.2d 1370 (Ct Cl. 1970), and *Paccon, Inc. v. United States,* 399 F.2d 162 (Ct Cl. 1968). Where a release is given without consideration, it will not constitute a defense to a claim raised under the contract and payment of an amount in undisputedly due does not constitute consideration. *Pennwalt Corporation v. Metropolitan Sanitary District of Greater Chicago,* 368 F. Supp. 972 (N.D. Ill. 1973). This is true even where the release itself recites the sufficiency of consideration, for where the consideration was actually not paid a release is prevented from having legal operation. *Milwee v. Peachtree Cypress Investment Company,* 510 F. Supp. 279(E.D. Tenn. 1977).

Absher, supra. CCH Slip op at p. 4. Emphasis added.

2. Modification 25

a. The Government did not provide any performance (benefit) other than what was already due Appellant.

(i) Reinstatement of 114,758 cases of MREs in the MRE VI configuration. R4, tab 133, p. 2, No. 1.a.

In December, 1985, the Government partially terminated Freedom's contract. The Government removed 114,758 (R4, tab F111) cases from a total of 620,304. R4, tab 10. Freedom immediately contested the termination on the grounds that the delays were Government caused. R4 tab FT 211. The specifics were the same as the basis for Freedom's current claims for breach of contract and equitable adjustment, i.e., failure to make progress payments, improper deductions from progress payments, failure to comply with the advance agreement on costs and interference with financing institutions, suppliers and vendors. *Id.*, see also Finding 328.

Freedom has met its burden of proving that the production failures in November and December of 1985 were Government, not Freedom, caused. Accordingly, there was no basis for the partial termination and, therefore, the reinstitution of the 114,758 cases by Modification 25 does not amount to legitimate consideration.

(ii) Delivery schedule extensions. R4, tab 133, p. 3, No. 1.c.

During the negotiations preceding the execution of Modification 25, Freedom encountered production delays that were caused by the Government's failure to honor the agreement to make payments for modern, efficient production equipment. This fact is clearly established as the result of the current litigation. Findings 209 - 232[2]. Accordingly, the production delays were the fault and the responsibility of the Government.

Inasmuch as the production delays were caused by the Government, Freedom was entitled, *inter alia*, to a delivery extension to accommodate those delays. Since Freedom entitlement is clearly established, the delivery extensions in Modification 25, do not constitute viable consideration.

(iii) $399,111.00 "Capital Equipment" payment. R4, tab 133, p. 3, No. 2; Findings 209-232.[3]

As fully established in the Post Hearing Brief, (Findings 209-232), the parties formally agreed during price negotiations that Manufacturing Overhead and General & Administrative expense would be chargeable directly with $522,218 of "capital" expenses. FT062, Exh. 9; Finding 60. The Government breached this agreement, and therefore the MRE 5 contract into which it was incorporated, by refusing to allow progress payments, or any other payment, based

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[2]The citations of various "Findings" in this Supplemental Post-Hearing Brief refer to the Findings in Appellant's Post-Hearing Brief.

[3]The Government paid $123,107 of this amount as part of progress payments but was clear that this payment had been a mistake on their part.

on these expenses. As of the date of Modification 25, the Government remained in breach of the contract.

The agreement in Modification 25 for the Government to pay the $399,111, i.e., $522,218 less the $123,107 paid by mistake, was nothing more than the Government curing its own breach. Accordingly, such agreement to pay fails as valid consideration for Freedom's purported release.

(iv) The Government's agreement to make payment after Modification 25, over and above, the $399,111, "Pursuant to the Payments and Progress Payments clauses of the contract and the Defense Acquisition Regulations." R4, tab 133, p. 3, No. 2.

The Government was already obligated by the MRE 5 Contract to make payments in accordance with the cited clauses and the DAR. This language of Modification 25 (R4, tab 133, p.3, no. 2.) only demonstrates further the Government's chronic critical material breach of the contract by failing up to that time to make such payments. The incorporation of the language in Modification 25, by which the Government promises to do that which it was already obligated to do, fails as consideration for the purported release. As a matter of note, the Government continued after Modification 25 to fail to make payment as required by the contract. (Finding 328)

(v) The reimbursed $200,000 previously taken by Modifications POOO11 and POOO18. R4, tab 133, p. 3, No. 4.

As absolutely established by the Post Hearing Brief, and which is uncontradicted by the Respondent, the production delays covered by Modifications P00011 and POOO18 were caused by the Government's material breach, i.e., its failure to make payments in accordance with the terms of the contract. Findings 268-293 With knowledge of Freedom's financial condition (see "Government's Answer to Appellant's More Definite Statement," para. 27), caused by the Government's breach, the Government was able to successfully extort from Freedom the subject

$200,000 in the two modifications. Freedom tried to obtain a fair resolution of the situation from the Government. R4, tab G83, p. 2 (e). The Government, however, exercising its enormous power over this single contract, small business producer, unconscionably refused.

Moreover, Freedom never even received the $200,000 "reinstated" by Modification 25. The Government breached its duty to provide GFM for the last 114,758 cases.[4] Freedom could not produce the cases without the GFM. Since most of the 114,000 cases were not produced on account of the Government's breach, the $200,000 which was reflected in the unit price was never recovered.

The Government was never entitled to consideration for the production delays in the first place. The recision of the $200,000 "consideration" cannot legally or equitably be considered as valid consideration for the Modification 25 release. In addition, the $200,000 fails as consideration because it was never paid.

Modification 25 does not represent any performance "different from that which was claimed as due" by Freedom. For that matter, Modification 25 does not represent any performance by Respondent that the record of this case has not absolutely established was already due from respondent. In that regard, and reiterating the above:

(1) The delays in November, December 1985 production, that resulted in the partial termination of 114,758 MRE cases, were caused by the Government. The termination was improper. Accordingly the reinstatement of the 114,758 cases by Modification 25 was no more than the performance that the Government owed Freedom and was not valid consideration;

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[4]The PCO, Mr. Frank Bankoff, adamantly denied that the Government had failed to purchase sufficient GFM for the MRE-6 quantities added by Modification 25. Tr 1299&1300. The same Mr. Bankoff, however, at an earlier hearing involving the same subject matter admitted that except for crackers, DPSC had never purchased sufficient amounts of MRE-6 configured components to permit assembly of the entire reinstated quantity of 114,758 cases. *Freedom, NY, Inc.*, ASBCA No. 35671, 96-2 BCA ¶ 28,502 (1996), p. 141,470, Finding 76.

(2) The delays subsequent to Modification POOO18 were also the responsibility of the Government. Accordingly, the extension of time set forth in Modification 25 was performance already due Freedom and therefore, not valid consideration.

(3) The capital equipment payment of $399,000 provided by Modification 25 was not only performance already due Freedom, but was a solid admission by the Government that they were responsible for the production delays discussed hereinabove. In other words, the Government's continuing breach, by which it wrongfully and maliciously failed to make these payments, prohibited Freedom from obtaining the production equipment on which the Government knew from the inception of the contract that Freedom counted on to make delivery schedules. As performance already due Freedom, the $399, 111 payment was not valid consideration;

(4) The Government agreement in Modification 25 to make subsequent payments in accordance with the terms of the contract was obviously performance already due Freedom and not valuable consideration.

(5) The "reinstated" $200,000 represented money extorted from a desperate contractor. It represented performance already due Freedom and therefore does not constitute valuable consideration. Moreover, it was never paid by the Government.

In summary, there was absolutely no consideration because Modification 25 contained nothing from the Government to which Freedom was not already entitled. As Mr. Thomas has testified:

> what's included -- what's included in the mod is that the Government is going to give us the things we're already entitled to.

Tr. p. 637; Cf: pp. 638-642.

Even if it can be concluded that there was some valuable consideration, and it can not, Modification 25 is not binding because the Government, as set forth in the section immediately following, failed to meet its own obligations under the Modification.

B. Breach of Modification 25 by the Government Vitiates the Release

Modification 25 specifically provided for Freedom to produce and deliver 114,758 cases of MREs in the MRE-6 configuration. R4, tab 133, p. 2, 1.a. The modification established that the configuration would be described as set forth in the MRE-6 solicitation, DLA13H-85-R-845, and established new delivery dates. These new delivery dates encompassed, *inter alia*, the 114,758 cases. Implicit in the agreement to furnish the cases within the delivery schedule established by Modification 25 was the Government's obligation to provide required GFM in a timely manner.

The Government failed in its obligation to provide GFM. Findings 308 - 323. The Government not only failed its GFM obligation, it acted with malice by failing to even order the GFM. Finding 310.[5] By its actions, the Government materially breached the Contract and specifically Modification 25.

Aside from its failure to provide the required GFM, the Government breached the contract, and specifically Modification 25 by failing to pay for MREs delivered and accurately invoiced pursuant to DD 250s. (Findings 297-303)

Modification 25 required production and delivery of the remaining 440,062 cases of MREs. Only the last 114,758 cases were in MRE-6 configuration. Freedom successfully produced all MRE-5 configuration cases covered by the Modification. Finding 305. Between March 13, 1986 and April 3, 1987 (Modification 25 was executed on May 29, 1986), Freedom submitted 33

[5]See foootnote 4 above.

DD 250 invoices totaling $1,907,979., representing shipments of completed and accepted MRE cases. Finding 297.

On October 29, 1986, the Government determined to liquidate progress payments at 100% (Finding 304), rather than the 95% that was its practice to that point or the 82.6% rate that had been agreed to as part of the advance agreement on costs. Finding 62.

The Government failed to pay to Freedom the money admittedly owed on the 33 invoices. The Government maintains that it "liquidated" 28 of these invoices against Freedom progress payments, almost all at 100%. Freedom, however, was never informed of this procedure. Findings 302-303 The Government has recently admitted that at least five of these invoices, totaling $246,947 were never paid. Findings 302-303.

The Government, by failing to provide requisite GFM required to perform Modification 25 and failing to pay for MRE's required under Modification 25, "pursuant to the Payments and Progress Payments clauses of the contract and the Defense Acquisition Regulation" (R4, tab 133, p. 3. No. 2), breached the MRE 5 contract and specifically Modification 25. Such breach relieves Freedom from any performance under Modification 25 so that, should there be a finding that Modification 25 is supported by consideration, which it is not, the release still fails on account of the Respondent's breach.

In *Santee Modular Homes, Inc.*, AGBCA No. 95-220-1, 96-2 BCA ¶ 28,432 (1996), the Agricultural Department Board of Contract Appeals specifically addressed the issue of the breach of the release agreement. Citing to the Court of Claims decision in *Blackhawk Heating & Plumbing v. United States,* 224 Ct. Cl. 111, 622 F.2d 539 (1980), the Board said:

> Where, as here, a party specifies in a release that it will limit its pursuit of claims to certain matters in return for particular performance by the other party, that other party must perform the

> required action in the manner designated. Otherwise, that party cannot use the release as a bar.

Santee, supra, CCH slip op at p 5.

C. The Modification 25 Release Fails Because its Enforcement Would Be Unconscionable.

In the period immediately preceding the execution of Modification 25, Freedom engaged in lengthy negotiations with the Government over problems Freedom had encountered. Findings 271, 276, 280 These problems led Freedom, on April 24, 1986, to submit a $5.7 million claim[6] to the procuring contracting officer, Frank Bankoff. R4, tab FT266; Findings 294-296.

The negotiations were referred by the PCO to DLA (Bankoff testimony at Tr. 1267) and were conducted for Freedom with representatives of DLA by an outside attorney, Mr. David Lambert and a consultant, Colonel Frank Francois.[7] The result of the negotiation was agreement by the parties to a series of contract actions and good faith commitments. These actions and good faith commitments were only partially covered by Modification 25 itself but, as understood by Freedom, were all part and parcel of the same overall understanding.

The non-Modification 25 portion of the agreement was confirmed and submitted to the Government as a letter, dated May 13, 1986, to be attached to the formal modification. R4, tab FT 280. Freedom believed that the understanding so documented was agreed to and represented good faith commitments by the Government. Thomas testimony at Tr. 628; Lambert testimony at Tr 836 - 842; Francois testimony at Tr. 2047 - 2050.

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[6]In March 1986, even before the formal claim was submitted in April 1986, the claim amount was orally reduced to $3.4 million on the basis that only cost, not profit, would be reimbursed. The $3.4 m are the costs associated with the certified claim of April 14, 1986. Tr. P. 608 & 609.

[7]The DLA negotiators were at the highest level. They were Mr. Ray Chiesa, DLA's Executive Director of Contracting, i.e., the highest contracting official in DLA (Tr. P. 2049), and Mr. Carl Kabiesman, the DLA General Counsel. Tr. p. 833.

Freedom, in the person of its president and CEO, would not have signed Modification 25, and thereby relinquished a $3.4 million claim, if it did not believe in good faith that there was an overall agreement which included the understandings documented in the May 13th letter. Tr. 643 -649. The Government refused to honor the agreement. (See section immediately following) This left Freedom in the impossible position of having relinquished its claim while gaining nothing in return. In fact, without the claim or the financing the Government had promised per the May 13, 1986 letter, Freedom was doomed to failure.

In *Comshare, Inc.*, ASBCA No. 49284, 98-1 BCA ¶ 29,588 (1998), the Board considered a Government claim that its recision of a contract was valid based on the Government's unilateral mistake. The Board refused to grant the appellant contractor's motion for summary judgment. The Board quoted the restatement of contracts as follows:

> A unilateral mistake justifying rescission may be found where the effect of the mistake is such that enforcement of the contract would be unconscionable, or the other party had reason to know of the mistake or its fault caused the mistake. *See* Section 153, RESTATEMENT (SECOND) OF CONTRACTS(1981).

Comshare, supra, CCH slip op at p. 7.

The United States Supreme Court has said:

> (T)he doctrines of fraud, unconscionable dealing and unjust enrichment are to be strictly applied to insure fair and honest dealing between the Government and its citizens.

Muschany et. al. v. United States 324 U.S. 49; 65 S.Ct. 442 (1945)

More recently, this concept has been codified in the Uniform Commercial Code and adopted by this Board. In that regard, as cited in *Manistique Tool and Manufacturing Company*, ASBCA No. 29164, 84-3 BCA ¶ 17,599 (1984), UCC §2-302 states:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Manistique, supra, CCH slip op at p.7.

The Government would have the Board believe that it never led Freedom to understand that it had an overall agreement which included the points confirmed in the May 13th cover letter. The testimony of Lambert and Francois and common sense dictates the opposite conclusion. Freedom clearly would not have given up its claim and signed the release unless it believed in good faith that the Government would abide by the cover letter agreement.

The Government apparently never intended to fulfill its commitments. R4 tab F134; Tr. pp. 839-840. The actions of Contracting Officer Bankoff can only be seen as contrived to induce the execution of the release. Tr. pp. 644-646; 2048-2049. Enforcement of that release would clearly be unconscionable.

D. The Modification 25 Release Fails Because Modification 25 Was Induced by Fraud

Freedom first expressed a need for monetary and schedule relief at a meeting that was held at DPSC on December 9, 1985. At that meeting Freedom also advised DPSC of its intent to submit a claim. R4, tab FT 220. As previously indicated, Freedom did file a claim with the PCO on April 24, 1986 R4, tab F266. Freedom and the Government were not able to settle the claim because Freedom, (1) wanted assurance of participation in the MRE-7 procurement and (2) refused to waive its $3.4 million dollar claim. At that point DPSC advised Freedom that it was going to refer the negotiation of the claim to DLA headquarters for resolution. R4, tab FT 263.

DLA and Freedom's representatives, (Lambert and Francois) discussed Freedom's projected loss of $2.7 million dollars and how to cover these costs with DLA representatives

Kabiesman and Chiesa Tr. p. 831. Mr. Lambert testified that the parties understood that there were certain things the Government could do to assist Freedom. Kabiesman and Chiesa said they wanted Freedom to succeed and were prepared to take certain actions to make that possible. These were basically administrative actions outside the contract. Tr. p. 836.

During the course of these discussions a suggestion was implemented whereby the parties agreed that a Government Guaranteed Loan might be the vehicle to provide the funds required to complete the Contract. Tr. p. 837. DLA represented that it was thoroughly familiar with the loan operation procedures. *Id.* The parties agreed that the Guaranteed Loan was to be applied for in a timely fashion "to get additional funds into the contract." The DLA representatives agreed that they would process the loan in a timely fashion. Tr. pp. 837-838.

Mr. Lambert has testified that he understood these agreements as follows:

1. All parties were familiar with the general operation of Freedom;
2. Freedom was part of the national industrial base so that everything was known about Freedom's eligibility to receive a Guaranteed Loan;
3. Freedom was eligible to receive a Guaranteed Loan

Tr. p. 838.

Freedom initiated the process of applying for the Guaranteed Loan. On June 24, 1986, Freedom informed Mr. Bankoff that Bankers Leasing Association had applied for a $2.7 million dollar guaranteed loan with the Federal Reserve Bank in Chicago. Mr. Bankoff advised Freedom that when it was received by DPSC, the Government would take the appropriate action R4, tab G137, pg. 4, #15 and V., Part D. The loan was turned down because, in fact, the Guaranteed Loan program had been in effect terminated **before** the negotiations with Messrs Chiesa and Kabiesman.

In fact, the Government at all times was misleading Freedom. The Government knew, or should have known, that as of its representation to Freedom during pre Modification 25 negotiations, there was no guaranteed loan program available for Freedom. Mr. Lambert, as he testified, only learned after the execution of Modification 25 that there had been a change in DLA policy. Mr. Lambert discovered that at some earlier point prior to the negotiations, DLA policy had changed in a manner that basically "shut down" the loans. Tr. p. 839. He further testified that the DLA representatives did not advise him that such a policy change had occurred and that at the time of his negotiations with Kabiesman (DLA's Chief lawyer) and Chiesa (DLA's Chief of Contracts), he was lead by those individuals to believe that there was no general policy prohibition, i.e., that the general DLA policy in favor, a policy that the DLA officials readily discussed, remained unchanged. Tr. p. 840.

It was Mr. Lambert's belief that Freedom had relied on the good faith on the agreement he and Colonel Francois had reached with these high level DLA officials. Mr. Lambert said that Mr. Thomas would not have signed the modification and given up his claim had there been any thought that the Government was not going to meet its commitment to process the loan. Mr. Lambert testified that he had no reason to believe that the Government would take any actions that were inconsistent with applying for the Loan. Tr. pp. 841-842.

The Government's actions with respect to the overall agreement, and PCO Bankoff's actions with respect to obtaining execution of Modification 25, clearly amount to fraud in the inducement. The United States Court of Federal Claims has consistently found that a contractor may avoid performance of a contract induced by fraud on the part of the Government. The elements required to establish fraudulent inducement, according to the Court of Federal Claims, are as follows:

> (1) that there was a misrepresentation; (2) that the misrepresentation was either fraudulent or material; (3) that it operated as an inducement to entering into the contract; and (4) that plaintiffs were justified in relying on the misrepresentation. Restatement (Second) of Contract §164(1981).

CTA Incorporated v. United States, 44 Fed. Cl. 684 (1999).

Every element associated with fraud in the inducement has been proven by Freedom:

1. **The Government misrepresented that, as part of an overall agreement that included the execution of Modification 25, it would abide by the agreement negotiated by Messrs Lambert and Francois.** That agreement included the promise 1. that it would process a guaranteed loan in the amount necessary to cover Freedom's shortfall; 2. that it would negotiate a fair and reasonable contract with Freedom re MRE-7; 3. that it would provide assistance in obtaining certain 8(a) contracts; and 4) and that it would provide assistance in clearing up a medical hold on some 46,000 MRE-5 cases (R4, tab FT280);

2. **The Government's misrepresentation was both fraudulent and material.** The Government's misrepresentation was fraudulent in that the Government never intended to consider the overall agreement as part of the Modification 25 transaction and, further, it knew, or should have known, that the guaranteed loan program was no longer a valid option for Freedom. The Government's misrepresentation was material in that it induced Freedom to give up its $3.4 million claim and provide a further release of all such claims.

3. **The Government's representation provided an inducement for Freedom to enter Modification 25.** Freedom was in a loss situation because of Government responsible acts. The Government held out the guaranteed loan as a substitute for Freedom's existing $3.4 million claim. Freedom was induced to rely on the Government's misrepresentations

as a way to obtain the funds needed to complete the MRE-5 Contract and at the same time obtain the future work needed to stay in business.

4. **Freedom was clearly justified in relying on the misrepresentation.**

Freedom sent two highly competent representatives to negotiate with the highest levels of DLA. These representatives, Messrs Lambert and Francois, have testified that they believed the representations made by DLA officials. Freedom then reduced the agreement to writing, provided it to contracting officer Bankoff before signing Modification 25, asked Bankoff to get approval, was led to believe that there was approval and, therefor, was justified in their reliance on the representation as a basis for the execution of Modification 25.

Because it was induced by fraud, the Board should find that Modification 25, along with its release provision, was void. *William C. Godley and Robert W. Godley v. United States*, 5 F.3d 1473 (1993). See also, *Restatement (Second) of Contracts 8237; J. Cibinic and R. Nash, Formation of Government Contracts* 71-73 (3rd Ed. 1998).

III. MODIFICATION N0. P00029

A. The Release is Limited to the Subject of Modification 29

Modification No. P00029 (Modification 29) was signed by Freedom and the Government on October 7, 1986. Findings 350-351; R4, tab 159. Its intent was to provide for a short extension of the contract delivery schedule. The extension was made necessary by the Government's failure to provide Government furnished material (GFM) as required by the contract. Finding 308 - 323. It contained the following provision:

> In further consideration of the aforesaid extension of delivery schedule, the contractor for itself, its successors and the assigns, releases and forever discharges the Government of and from all manner of action, causes of action, suits, proceedings, debts,

> dues, judgements, damages, claims and demands whatsoever, in law or in equity or under administrative procedures, which, against the Government, the contractor ever had, now has, or may have for or by reason of any matter, cause or thing whatsoever arising out of award and performance of the subject contract to date, except claims relating to Zyglo Testing implemented in modifications P00024 and P00026 or monies due or to become due as payment for product delivered to and accepted by the Government.

1. The Government's failure to provide GFM.

Revised delivery schedules were negotiated by Freedom and the Government in Modifications P00025 and P00028. R4, tab 133, tab 144. However, the Government breached its obligations under these modifications when, *inter alia,* it failed to provide the required GFM that Freedom was relying upon in order to meet those schedules and to complete the balance of the contract. Findings 308-323.

Modification P00025 executed on May 29, 1986 purported to reinstate 114,758 MRE cases that had been previously and improperly terminated for default. *Id.* See II.A.2 above. Pursuant to Modification 25, the reinstated cases were required to be in the MRE-6, rather than the MRE-5, configuration. *Id.* The Government, with the full intention of rendering Freedom's performance impossible, failed to procure the required MRE-6 configuration GFM essential to Freedom's performance. Tr. pp. 1278-79, 1299.

Despite performance improvements, Freedom was able to ship only 46,260 cases against the 80,000 due by September 1986 per Modification P00025. The evidence is overwhelming that the cause of delay was GFM outages. Findings 308-323 The main cause of the production slippages and down time leading to Modification 29 was stock outages of GFM fruit and potato patties. R4, tab 144, tab 145. Because of the Government failure to provide the

requisite GFM, Freedom was unable to assemble completed MRE cases for delivery. By letter dated 17, September 1986 (R4, tab 153), Freedom told the Government that the lack of GFM fruit and potato patties was causing delivery slippages and Freedom proposed a revised delivery schedule.

On September 26, 1986, Messrs. Thomas and Bankoff were negotiating the terms of Modification 29. The express purpose was to extend the delivery schedule because of the aforesaid GFM outages. Modification 29, *inter alia*, extended the delivery schedule to accommodate the shutdown of production during the last week of August 1986 caused solely by the GFM outages.

2. The purpose and intent of Modification 29.

Modification 29 is ineffective as a defense to Freedom's appeal because the release language in Modification 29 is limited to the subject of Modification 29. In *Ralcon, Inc.*, ASBCA No. 43176, 94-2 BCA ¶ 26.935, the Board addressed a situation where the Government agreed to compensate Ralcon for unabsorbed overhead. A bilateral modification incorporating this agreement also included a broad general release "of all claims, demands or causes of action, legal, equitable, contractual or administrative, that the contractor may have in relation to technical data deficiencies connected with the performance of the contract." *Ralcon, supra*, CCH slip. op. at p. 9.

The Board looked closely at the circumstances surrounding the execution of the Ralcon release. The Board felt obligated to make such an examination because:

> The Government has the burden of proving the affirmative defense of accord and satisfaction, *Loral Corporation, Defense Systems Division-Akron*, ASBCA No. 57627, 02-1 BCA 24,661 at 123,026; *Infotec Development, Inc.*, ASBCA Nos. 31809, 32235, 91-2 BCA 23,909 at 119,786. **Releases are to be**

> **scrutinized carefully to determine the true intent of the parties.**
> *Leslie & Elliott,* ASBCA No. 35271, 89-1 BCA 21,263.

Id. at 11. Emphasis added.

Upon finding that the modification only covered the issue of unabsorbed overhead, the board struck the general release. The Board said:

> Based on the record as a whole we have determined that so much of the release clause that releases all "CLAIMS, DEMANDS OR CAUSES OF ACTION ... THAT THE CONTRACTOR MAY HAVE IN RELATION TO THE TECHNICAL DATA DEFICIENCIES" goes beyond the agreed intent and contemplation for modification P0007 and P0004.

Id. at 12. Emphasis in the original.

Modification 29 had one subject and one subject only. Its sole intent was to extend the delivery dates for the last 210,062 cases. These dates had been established 60 days before, by Modification 28, as follows (R4, tab 144, ¶ a):

Line Item	Quantity	Delivery Date
0001KR	80,000	10 Sep 86
0001KS	15,304	10 Oct 86
0001KT	64,696	10 Oct 86
0001KU	50,062	12 Nov 86

Modification 29's **single change** to the contract, which the record now establishes was necessitated by lack of GFM (Findings 328-303), was as follows:

Line Item	Quantity	Delivery Date
0001KR	80,000	15 Oct 86
0001KS	15,304	15 Oct 86
0001KT	64,696	15 Nov 86
0001KU	50,062	5 Dec 86

R4 tab 159, ¶ A.

Although Modification 29's single substantive effect was to extend delivery less than 30 days overall, it included a general release, obviously totally unrelated to the delivery extension, from:

> ... all manner of action, causes of action, suits, proceedings, debts, dues, judgments, damages, claims, and demands whatsoever, in law or equity or under administrative procedures which, against the Government, the contractor ever had, now has, or may have for or by reason of any matter, cause or thing whatsoever arising out of award and performance of the subject contract to date, ...

Id., ¶ C.

As in *Ralcon,* the omnibus release language of Modification 29 goes far "beyond the agreed intent and contemplation" of that modification. Appellant respectfully submits that the Board should follow *Ralcon* and find that the Modification 29 is no bar to appellant's claims in this matter,

B. Freedom's Claims for Equitable Adjustment and Breach of Contract Were Excluded from the Release in Modification 29.

The Modification 29 release includes a specific exception for:

> monies due or to become due as payment for product delivered to and accepted by the Government.

Id. The MRE 5 contract, of course, contains a standard "Changes" clause.

The "Changes" clause provides for an equitable adjustment in price and/or delivery schedule if Government acts or omissions change the contract so as to increase the contractor's costs to perform and/or its time required for that performance. The Changes clause provides further that the resulting equitable adjustment shall be incorporated in a modification to the contract. However, "constructive changes" based on the "Changes" clause, which have never

been reduced to writing, are just as binding and have been a staple of federal procurement law for more than fifty years.

Assuming that the acts or omissions detailed in Appellant's post-hearing brief constitute changes, constructive or otherwise, under the Changes clause, the equitable adjustment to which appellant became entitled, as of the instant the Government act or omissions impacted appellant's performance, amounts to **monies due or to become due as payment for product delivered**. This is clearly the case whether or not the entitlement was then **or ever** recognized by the Government.

The release language was drafted by the Government. Assuming an argument that the Government did not intend to include Appellant's Changes clause entitlement in the term "monies due," the language is ambiguous. It must be construed against the drafter, i.e., the Government, and in favor of Appellant. It must be construed to exclude any monies otherwise ligitimately due as payment for product delivered.

To summarize, it is appellant's position that the release, if not totally invalid, must be held to except "monies due for product delivered." Further, that those "monies due" include any legitimate equitable adjustment in price for that product to which the appellant would be otherwise due (entitled) under the contract. Such an equitable adjustment would include that sought by appellant in this litigation.

C. The Release Language in Modification 29 Is Ineffective as a Defense to Freedom's Claims Because Freedom's Claims Had Not Arisen at the Time Modification 29 Was Executed

Freedom's claims did not fully arise until the contract was terminated for default on June 22, 1987. The release language in Modification 29 purports to release claims arising out

of the performance of the contract to October 7, 1986. R4, tab 159. A release is ineffective and unenforceable when it is so broad as to attempt to waive future claims where the full facts and basis for those future claims is unknown.

In order for a modification to act as an accord and satisfaction of a claim, there must be a meeting of the minds regarding the scope of the accord and satisfaction. *River Road Construction, Inc.*, ENG BCA No. 4618, 84-3 BCA ¶ 17,583. In *River Road*, the Government's defense of accord and satisfaction was rejected because 1) the modification was executed before the disputed claim was fully asserted, 2) the scope of the disputed work was not yet established, and 3) the cost of the work was unknown. The case is analogous to Freedom's situation. Modification 29 was executed before Freedom's claim was fully determined.

At the time Freedom signed Modification 29, the scope of its damages was not yet established. Freedom could not know the Government would prevent it from completing the Contract by failing to provide the necessary GFM (Findings 308-323) and by improperly liquidating progress payments at 100%, (Findings 304-307) and failing to make progress payments and DD250 delivery payments (findings 294-303) as detailed in the principal brief. Likewise, Freedom was unaware that the Government would refuse to fulfill its commitment to process a Guaranteed Loan on Freedom's behalf. R4, tab 280; R4, tab F134; Tr, 839-840 Neither did Freedom know when it signed Modification 29 that it would be denied the fair opportunity to participate in an award for MRE-7. Findings 352-359.

D. Modification 29 Release Fails for Lack of Consideration [8]

[8]For a discussion of the law regarding consideration see section II.A.1 above. As to the allowability of extrinsic evidence to determine the intent of the parties, see F/N1.

Modification 29 purports to grant delivery schedule extensions for the 210,062 cases that had not been delivered at the time Modification 29 was signed on October 7, 1986. R4, tab 159 The maximum extension provided by Modification 29 for any one delivery was 35 days. *Id.* These extensions were a sham for the following reasons:

1. 114,758 cases of the remaining 210,062 could not be delivered because of the Government's failure to furnish the necessary GFM. Findings 308-323. Clearly, the extension of a delivery schedule for 114,758 cases that were impossible to complete because of the Government's breach of the contract represented nothing of value or benefit to Freedom. The Government's failure to provide GFM to support the 114,758 cases in the MRE-6 configuration is well documented in Freedom's Post-Hearing Brief. *Id.*

2. The Government's GFM failure was the sole cause of the delivery delay. *Id.* ACO Liebman explicitly acknowledged the fact. In his memo dated September 26, 1986, he states:

> Modification P00029 was faxed to Freedom for signature to OCT 86. The modification revises the delivery schedule as a result of delays encountered in receipt of GFM.

Thus, if the sole purpose of the modification was to extend the contract delivery schedule, which it was, and the reason for its extension was the Government's failure to provide GFM, any release of claims by Freedom lacked the requisite consideration.

3. The language of the release in Modification 29 excludes "...claims relating to Zyglo testing..." It is well documented in Freedom's Post-Hearing Brief that the increase in the scope of work occasioned by the Government's imposition of Zyglo testing caused delays in excess of 1½ months. Findings 340-344; Appendix - Quantum Charts, **Figure 8.** The

excusable delay associated with this additional effort certainly exceeds the maximum schedule extension (35 days) prescribed in Modification 29. Since Freedom is entitled to an extension for the Government's imposition of Zyglo testing that exceeds the extension set forth in the modification, there exists no consideration for a release by Freedom of its asserted legitimate claims.

4. There isn't even a finding in the modification that the delay was Freedom's fault. On the contrary, the second Whereas provision on page 2 states:

> WHEREAS, Contractor's delinquency or anticipated delinquency **may be** the responsibility of the Contractor.

Emphases added.

The Modification, and the record, provide no support for any finding that Appellant was responsible for the delay. Freedom's assertion that the delay was caused by the failure to provide GFM is uncontested. In fact, the cause of the delay was confirmed by the Government. Modification 29 gave nothing to Freedom that Freedom was otherwise not entitled to. Any government contention that Freedom gave up all its rights for a 35 day delivery schedule extension to which it was already entitled is untenable.

Furthermore, the modification contained no mutuality of obligation. Freedom purportedly waived its claims against the Government. The Government, however, gave up absolutely nothing. In that regard paragraph F of the modification states:

> [T]his modification does not constitute a waiver of any of the Government's rights including the right to terminate the Contract for default for any existing default or the right to invoke the warranty clause for other defects.

The lack of parity between obligations renders Modification 29 unenforceable. Further, the Modification lacks adequate consideration because the promises contained in it are illusory.

The exculpatory clause (release) unreasonably requires Freedom to waive all of its rights without the Government foregoing anything in return. See e.g. *Charter Inv. & Dev. Co. v. Urban Med. Serv.*, 136 Ga. App. 297; 220 S.E. 2d 784 (1975).

E. Modification 29 and the Release Provision Therein Is Unenforceable Because it Was Signed under Economic Duress

The Government's use of economic duress in obtaining a contract amendment or a release from a contractor renders a release unenforceable. *See, e.g., Urban Plumbing & Heating Company v. U.S.*, 187 Ct. Cl. 15, 408 F.2d 382 (1969); *Paccon, Inc.*, ASBCA No. 7890, 1963 BCA ¶ 3659, *mot. for reconsid. denied,* ASBCA No. 7890, 1963 BCA ¶ 3730;

There is no precise definition of duress, and a finding of duress depends upon the circumstances of each individual case. *Fruhauf Southwest Garment Company v. United States,* 126 Ct. Cl. 51, 111 F. Supp. 945 (1953). However, the general rule is that a modification or release is unenforceable by virtue of the exercise of duress where the following three elements are present: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) circumstances were the result of coercive acts of the opposite party.

1. Freedom did not voluntarily accept the terms of Modification 29

A review of the record demonstrates that Freedom did not voluntarily accept the terms prescribed in Modification 29. Findings 350-351. The Government had knowingly forced Freedom into a single contract, single program (MRE) producer. Findings 13 -19. The Government, by breaching the payment agreements associated with that contract had caused Freedom financial crisis. App. Br. pp. 162-168. If Freedom had failed to execute Modification 29, the Government would have continued withholding the $700,000 due Freedom under Modification P00028. Such withholding would have resulted in contract default and Freedom's

elimination from the program *Id.* Absent that arbitrary and capricious threat of imminent default, a default that the Government knew would **(and did)** destroy the company, Freedom never would have signed Modification 29.

Modification 29 was just another manifestation of the Government's campaign to orchestrate Freedom's collapse. As the Government knew full well, because it was responsible for the situation, Freedom either signed Modification 29 or died.

2. Freedom had no practical alternative to signing the Modification.

There is a presumption arises that a release is involuntary if a contractor has no reasonable or practical alternatives and is thus vulnerable to the Government's pressure. *Aircraft Associates & Manufacturing Company v. U.S.*, 174 Ct. Cl. 886, 357 F.2d 373 (1966). Freedom had no practical alternative to signing the modification and was entirely vulnerable to Government's pressure.

Executing the modification was the only way Freedom could continue performance of the Contract. *Id.*. Freedom was already in a serious loss position having suffered extreme and irreversible financial damage due to the Government's failure to adhere to the terms of the Contract. The Government was well aware of Freedom's claim for more than $2.7 million in cost over runs and "loss" position R4, tab F131. And, the Government was also over $3 million behind in progress payments as of the Modification 29 date. R4, tabs F 155, F162.

The Government had previously issued two default termination's on December 6, 1985 and January 2, 1986. Findings 268-293 Although these "defaults" were in fact the result of Government compensable acts, it was unquestionable that a default termination was assured if Freedom did not execute the modification.

In determining whether duress is present, the cases focus on whether the will of the party coerced has been defeated, not on the strict legality or illegality of an act. *See, e.g., Systems Technology Associates, Inc. v. United States,* 699 F.2d 1383 (Fed. Cir. 1983). Thus, the Government's motivation for an act or threat may be more important to the finding of duress than the strict legality or illegality of the act. *See, e.g., Allied Materials & Equipment Company,* ASBCA No. 17318, 75-1 BCA ¶ 11,150 (1975).

Applying these principles to this case, we need only examine the underlying motives of the Government in obtaining the modification. Total financial collapse and bankruptcy were imminent. The Government was aware that a failure on Freedom's part to complete the contract would preclude Freedom from an award of a contract for MRE-7 and force its subsequent elimination as a planned producer. Findings 352-359. Further evidence of the Government's intent was the fact that the modification itself was issued pursuant to the authority of the "Default" clause. (See Box 13 of Modification 29 cover page 1 of 3).

3. The circumstances leading to freedom's execution of the modification were the result of the Government's acts of coercion.

A contractor need not prove that there was a wrongful act or express threat which immediately preceded execution of the modification in order to prove coercion. It need only show the wrongful act or coercion through a course of conduct which placed the contractor in such a vulnerable position that it had no choice but to execute a release. As stated in *David Nassif Associates v. United States,* 226 Ct. Cl., 372, 644 F.2d 4 (1981):

> To render an agreement voidable on grounds of duress it must be shown that the party's manifestation of assent was induced by an improper threat which left the recipient with no reasonable alternative save to agree. RESTATEMENT (SECOND) OF CONTRACTS ¶ 317 (Tent. Draft No. 11, April 1976).

> Contemporary case law has expanded the concept of improper threat beyond the categories first recognized, namely, threats to commit a crime or a tort; now also included are threats that would accomplish economic harm. RESTATEMENT (SECOND) OF CONTRACTS ¶ 318, Comment a (Tent. Draft No. 11, April 1976); Johnson, Drake & Piper, Inc. v. United States, 209 Ct. Cl. 313, 531 F.2d 1037 (1976); Air Craft Associates & Mfg. Co. v. United States, 174 Ct. Cl. 886, 357 F.2d 373 (1966). **Such forms of economic duress, or, as it is sometimes also called, business compulsion, include threats that would breach a duty of good faith and fair dealing under a contract as well as threats which, though lawful in themselves, are enhanced in their effectiveness in inducing assent to unfair terms because they exploit prior unfair dealing on the part of the party making the threat.**

Emphasis added..

The Government had every reason to know that it had forced Freedom into a hopeless financial position. As a result, Freedom had a large (over $3,000,000) and meritorious claim for equitable adjustment. Findings 294-296 The Government clearly took advantage of the financial crisis it had created for Freedom in negotiating Modification 29. R4, tab F155.

The Government recognized the merit of Freedom's claim from the beginning. In an effort to put an end to its exposure, the Government attempted to short-circuit the claim. The idea was to force Freedom to execute a release. The Government exposed its unconscionable act by incorporating the release in a modification that's only legitimate purpose was to effect a short delivery schedule extension. Even more amazing, the delay necessitating the extension was admittedly caused by the Government. Findings 268-293.

The modification itself bears out the Government's duress. A near bankrupt contractor facing a several million dollar cost overrun caused by a flagrant Government breach, does not release a $3.4 million claim, not to mention all its other remedies. for a minor delivery extension

to which it was already entitled. Modification 29 is completely shocking to any fair mind and on its face shows the Government's overreaching.

Internal documents provide absolute proof knowing use of unfair coercion to leverage the release of claims. By letter dated October 7, 1986, (R4, tab F165) PCO Bankoff told Freedom that:

> "As we discussed on 26 September 1986 upon execution of modification P00029, the current progress payments ceiling for the subject contract, per modification P00028, will be $14,900,725 dollars based on delivery of 482,058 cases. To date you have been paid $14,178,838. dollars. This leaves a balance of $721,887. available to you. This amount will be paid to you by DCASMA N.Y. against progress payments requests submitted by Freedom N.Y., Inc."

Even though the $721,887. was admittedly owed to Freedom under the terms of Modification 28, Freedom first had to execute Modification 29 to receive it. Lest there be any doubt about the intent of the PCO's letter, further evidence of coercion to which Freedom was subjected is found in two internal memoranda authored by ACO Liebman. The first, dated September 26, 1986, (R4, tab F155) makes note of the fact that:

> "The PCO and Freedom are currently negotiating an extension in the delivery schedule as a result of stock outage of GFM item, Fruit Mix, and shortage of GFM item, Potato Patties. The PCO is trying to get a waiver of claims against the Government as well as Monetary consideration for GFM item, Crackers at Freedom".

The ACO's note acknowledges that the Government was responsible for the delay and that the Government was at fault. Despite their understanding that Freedom was legitimately entitled to an equitable adjustment, the ACO and PCO were trying to get a waiver of the claims. Why, in heavens's name? Again, this was part of the continuing plan to prevent Freedom from getting equitable adjustments to which it was entitled under the Contract.

The second internal document (R4, tab 164) shows the reprehensible course of conduct by the Government to get Freedom's agreement to waive its legitimate claims in exchange for the payment of moneys already owed:

> Per PCO request 1600 HRS, 3 OCT 86, PP#21, in the amount of $700,000. dollars is being held in abeyance pending Freedom's execution of Mod P00029. This is expected to be accomplished during the week of 6 OCT 86.

Since Freedom acted under duress in executing Modification 29, what resulted was no different than a unilateral decision of the Contracting Officer. What was incorporated into the agreement was not a compromise but merely Freedom's unwilling adherence to a decision of the Government's authorized agent. As the cases readily demonstrate, such coercion conduct will not succeed and any purported release of claims is unenforceable.

IV FREEDOM IS ENTITLED TO INCREASED COSTS/DAMAGES RESULTING FROM EVENTS THAT OCCURRED SUBSEQUENT TO MODIFICATIONS 25 AND 29

A. Equitable Adjustment to Contract for Increased Costs Subsequent to Modifications 25 and 29.

In addition to the increased costs incurred as a result of the Government's imposition of Zyglo testing, Freedom is entitled to the increased costs resulting from the Government's acts or omissions that occurred subsequent to the execution of Modifications 25 and 299. R4, tab 159.

The release language in Modification 29, (the later modification,) purports to release claims arising out of performance of the Contract to October 7, 1986, the execution date. *Id.* Even if the Board rules that the releases in Modifications 25 and 29 serve to bar Freedom's claims, it would not prevent Freedom's assertion of legitimate claims arising after these modifications were signed.

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[9]Claims relating to Zyglo testing were specifically excluded from the purview of Modification 29. R4, tab 159.

1. Overhead and G&A Costs Associated with Post Mod 29 delays.

At the time the Contract was wrongfully terminated for default in June 1987, Freedom had delivered more than 505,000 cases and was processing the remaining 107,538. Freedom had incurred a total of $22,174,628. in the performance of the Contract. R4, tab FT 408, tab FT 413. The total costs estimated by Freedom had it been allowed to complete the Contract was $23,674,117. When compared with a negotiated and budgeted amount of $14,971,042 it equated to a contract cost over-run of $8,703,975 (See Quantum, Charts, **Figure 2**)

The overrun occurred, for the most part, as a result of Government caused delays which extended the contract completion from December 31, 1985 to June 22, 1987 (date of termination). As indicated in Quantum Charts, **Figure 5**, Freedom claims increased costs for continuing overhead and G&A expenses for an extended contract period of 16 months. At least two of those additional months of expenses are attributable to the months of operation subsequent to October 7, 1986, the date Modification 29 was signed

Continuing overhead and G&A costs were incurred on a consistent month to month level at the same time that Freedom was suffering major Government caused program delays. In each instance of delay, Freedom had no way of determining the exact or even the approximate time that the delay would last. Accordingly, it was unable to reduce or eliminate facilities and supporting personnel. Further, since this was Freedom's only contract, it was unable to allocate resources to any other cost objective.

2. Claim Resulting from the Government's Failure to Provide Government Furnished Material (GFM).

After October 7, 1986, the date Modification 29 was signed, the Government again failed to supply required GFM. This resulted in production shutdowns, layoffs and scheduled delays. By October 22, 1986, Freedom had still not received the GFM beef slices, diced turkey, ground beef or ham slices. Findings 308-322; R4, tab 161. Freedom notified the Government that it was shutting down MRE-6 assembly production of the remaining 114,758 units and laying off 146 production workers. *Id.*

In uncontested testimony, Mr. Martin Bernstein, Industrial Engineering expert, stated that a lack of GFM, or the receipt of substituted GFM would create an efficient operation. Tr. p. 895. Likewise, Mr. Philip Lewis, Freedom's technical consultant and training coordinator testified that without the necessary GFM it was impossible to perform any work on the product. Tr. p. 1086.

Freedom estimated that the failure to receive GFM over a several month period resulted in efficiencies, delays and shutdowns, which in the aggregate, extended the Contract by three months. Freedom attributes a 53 day delay from October 6, through November 30, 1986 to the Government's failure to provide GFM. At $13,004. per day, the amount claimed for the post Modification 25 and 29 period is $689,217. (See per month calculation of delay costs in Quantum, Charts, **Figure 7.**)

3. Claim for Government's Failure to Make Payments

As set forth in Quantum, page 221, Freedom believed in and relied on the Government's compliance in good faith with a contract payment provisions. As previously stated, throughout 1986 and into 1987, the Government failed to pay Freedom invoices for MRE's delivered and accepted (Findings 297-303) and wrongfully imposed a 100% progress payment liquidation rate (Findings 304-307).

The Government's funding failures caused delay and disruption to the Contract. Freedom, in an attempt to resolve the problem, was required to expend considerable management effort to secure alternate funding and to deal with the Government. R4, tab 126, tab FT 276; Findings 297-303. For the post Modifications 25 and 29 period, Freedom is entitled to $548,045. In increased costs. (See quantum, p. 221 and Quantum, Charts, **Figure 8).**

4. Claims for Increased Costs Resulting from Government Imposed Unreasonable Financing Requirements

As indicated in Quantum, page 222, ACO Liebman breached the agreement that the Government would provide prompt financing in the form of progress payment reimbursement at 95% of incurred costs. As a result of the breach, Freedom was forced to obtain an outside line of credit beyond what Freedom reasonable expected or required. During the life of the contract Freedom incurred $484,900 in additional working capital interest expense that had not been contemplated. R4, tab FT 413; Quantum, Charts, **Figure 8.** Freedom attributes 10% of the added interest expense or $48,490 to the post Modifications 25 and 29 period.

5. Equitable Adjustment for Increased Costs Resulting from Government's Imposition of Zyglo Testing

As previously stated, the increased costs of Zyglo testing were specifically excluded from the release language in Modification 29. The increased scope of effort caused by the imposition of Zyglo testing is described in Findings 333-339.

As indicated in Quantum, Charts, **Figure 8**, Freedom estimated a total of 1.5 months delay at $548,045 per month as the combined financial impact of its inability to receive CFM that had been diverted to other contractors as a result of the Government's breach of Modification P00020 and the delay associated with the Zyglo testing constructive change. Freedom believes that one-half of the total amount of $548,045 or $274,022 is a fair allocation of the cause of delay resulting

from the Government's implementation of the Zyglo testing in the post Modifications 25 and 29 period.

6. Profit

The equitable adjustment for increased costs as a result of the constructive changes as set forth above should include the element of profit. As with the total amount claimed in the Post Hearing Brief, the negotiated profit rate of 14.88% should be applied.

B. Claims for Unrecovered Program Investment Costs

As indicated in Quantum, pages 223-225, Freedom's agreement to make an investment for major startup costs (e.g. building repairs) was based on the Government's promise to maintain Freedom in the MRE program. Only with fruition of that promise could Freedom amortize the additional start-up costs that were not charged to the MRE 5 Contract. Because the Government breached this promise, Freedom lost its investment.

Freedom's total claim for unrecovered program investment costs amounts to $1,062,138. Quantum, Charts, **Figure 11.** Freedom believes that 10 % of this amount or $106,213 should be allocated to the post Modification 25 and 29 period.

C. Claims for Lost Profits on Successive MRE Awards

Freedom seeks an amount of $20,748,290 (Quantum, Charts, **Figure 12**) in lost profits as a consequence of the Government's actions and bad faith as fully set forth in Freedom's Post Hearing brief. These actions caused the wrongful termination of the MRE -5 Contract and the breach of the implied in-fact agreement to maintain Freedom in the MRE program.

Subsequent to the execution of Modifications 25 and 29, the Government caused Freedom's exclusion from the MRE program which in turn resulted in the destruction of its

business. (See Quantum, page 225-226). Foremost was the Government's egregious actions in failing to allow Freedom to complete the Contract.

Freedom had been designated and established as an IPP producer. Inherent in this designation was that Freedom would be maintained as on going producer to be kept available in times or war or national emergency. Findings 375-409. If not for the bad faith termination of MRE-5 Contract, the wrongful inclusion of CINPAC into the program as a replacement for Freedom and the improper negative pre-award survey of Freedom in connection with the MRE-7 award, Freedom would have remained in the program to this day and would have received the continuing stream of minimum sustaining contracts that CINPAC has received.

Thus, for the post Modification 25 and 29 period, Freedom asserts entitlement to the full amount of $20,747,290 in lost profits on successive MRE awards.

D. Claims for Miscellaneous Financial Damages

There were horrendous financial consequences as a result of the Government's bad faith actions. There are considerable amounts from bank loans and for suppliers' for goods and services under the Contract that are due and owing. As detailed in Quantum, pages 226-229, the miscellaneous financial damages total $16,611,660. Freedom believes that at least 1/10th of this amount or $1,661,166, can reasonable be allocated to the post Modification 25 and 29 period.

E. Claim for Lost Profits on MRE-5

As detailed in Quantum, page 229, Freedom is entitled to the profit that it would of earned on the reinstated 114,758 MRE cases that it never had the opportunity to deliver. That profit would have been earned in the post Modification 25 and 29 period.

The entitlement is calculated by applying the contract negotiated profit rate of 14.88% to the negotiated and agreed upon cost estimate to complete of $1,499,489 had Freedom been allowed to do so, which equates to lost profits of $223,124.

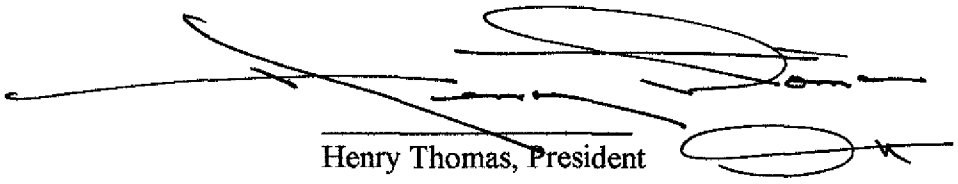
V. CONCLUSION

Appellant has submitted a 230 page principal post-hearing brief in this case. That brief includes 409 proposed findings of fact. The Government did not see fit to even reply. In truth, the Appellant's brief is probably much too long but it is telling. And what it tells is a tale of pure Government abuse.

The Government's failure to respond is telling as well. The Government does not really have a response. It knows full well that its actions were unconscionable. Accordingly it has chosen to rely solely on a technicality. The releases, it apparently is saying, will save us.

By this supplemental brief Appellant maintains that the Government should not be saved. Appellant respectfully requests the Board to find the releases incorporated in Modifications P00025 and P00029 invalid and no bar to any recovery that the Board otherwise would provide to Appellant in this matter.

Respectfully submitted, ProSe



Henry Thomas, President